

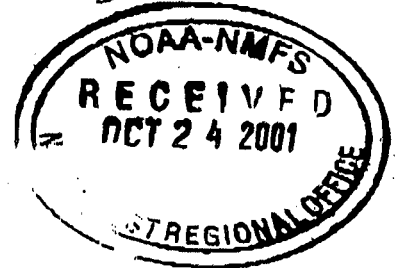
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October 22, 2001

BY FAX AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

D. Robert Lohn
Regional Administrator
National Marine Fisheries Service
7600 Sandpoint Way, NE
Seattle, WA 98115



Re: Delisting Petition

Dear Mr. Lohn:

I write on behalf of the Greenberry Irrigation District to petition, pursuant to 16 U.S.C. § 1533 and 50 C.F.R. § 424.14,¹ for the removal of two "species" of Pacific Northwest salmon from "threatened" status under the Endangered Species Act. The District also notes that the Secretary is under a duty, pursuant to 16 U.S.C. § 1533(c), to "conduct, at least once every five years, a review of" all listed species to determine, among other things, "whether such species should be removed from the list".

With the largest salmon runs observed this year since dam counts began in 1938, the time is ripe for reconsidering application of the Endangered Species Act to Pacific salmon stocks, and the best scientific and commercial data that must be considered in connection with this delisting petition include substantial increases in the salmon and steelhead runs identified below. See 50 C.F.R. § 424.11(d)(2).

This petition focuses upon the lawfulness of the listings under *Aisea Valley Alliance v. Evans*, No. 99-6265-HO (Sept. 10, 2001), and in particular the lawfulness of NMFS' treatment of hatchery fish. Judge Hogan's opinion establishes the following propositions of federal law:

- The National Marine Fisheries Service (NMFS) has determined "distinct population segments" (DPSs), the smallest units of fish and wildlife eligible for protection under the Act, through designation of "evolutionarily significant units" (ESUs). (Slip op. at 15.)

¹ Pursuant to 50 C.F.R. § 424.14(a), the undersigned states that he is an attorney for Greenberry Irrigation District, 30742 Venell Lane, Corvallis, OR 97333 (541-752-2446).

- NMFS may not protect DPSs smaller than the larger ESUs containing hatchery stocks, and may not include hatchery stocks within the ESUs, yet exclude them from the listings. (Slip op at 16-17.)
- NMFS may not redefine the ESUs to include only "natural"² stocks, omitting hatchery stocks, because hatchery and "natural" stocks are the same species and interbreed when mature, are not reproductively isolated in that they "share the same rivers, habitat and seasonal runs", because hatchery spawned salmon constitute very substantial portions of the ESUs, and because "NMFS considers progeny of hatchery fish that are born in the wild as 'naturally spawned'" and worthy of listing.³ The District notes that the United States Court of Appeals for the Ninth Circuit has previously acknowledged the "impossibility" of distinguishing "natural" from hatchery stocks.⁴
- NMFS does retain the option of broadening listing protections under the Act to include all "natural" and hatchery stocks within an ESU, to the extent that the best scientific and commercial data support the "threatened" or "endangered" risk status of the ESU *as a whole*. The District doubts that such a case can be made.⁵

These propositions, applied to the "species" discussed below, establish that their listings were and are contrary to law. See 50 C.F.R. § 424.11(d)(3).

Upper Willamette River Chinook

In listing the Upper Willamette River chinook salmon, NMFS declared that five of the six hatchery stocks associated with this ESU should be considered part of it: North Fork Santiam River, Middle Fork Willamette River, McKenzie River, South Fork Santiam River, and Clackamas River. 64 Fed. Reg. 14,308, 14,315 (Mar. 24, 1999). The sixth stock (Stayton Pond) was not included, though NMFS acknowledges that propagation efforts have caused "the loss of genetic diversity and the formation of a *single breeding unit* in the upper Willamette River basin". *Id.* at 14,322 (emphasis added). NMFS further acknowledged that "an estimated two-thirds of natural spawners are of hatchery origin". *Id.*

NMFS listed as "threatened":

"Upper Willamette River chinook salmon (*Oncorhynchus tshawytscha*). Includes all naturally-spawned populations of spring-run chinook salmon in the Clackamas River

² While Judge Hogan's opinion did not so hold, for most of the relevant "species", the very concept of "natural" stocks is itself arbitrary, capricious and contrary to law because salmon straying and hatchery operations have effectively eliminated any truly "natural" stocks.

³ Though Judge Hogan's observations on these factual points were directed to Oregon coastal coho salmon, as set forth below, the same observations apply to all the "species" subject to this petition.

⁴ *PNGC v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) ("it is impossible to enforce the [Endangered Species Act's prohibition against] trade and transport [of protected fish] . . .").

⁵ The District is informed that NMFS' own analyses of and methodologies for assessing extinction risk, when applied to ESUs as a whole, including hatchery stocks, show no appreciable risk of extinction for nearly all Pacific Northwest salmon ESUs.

and in the Willamette River, and its tributaries, above Willamette Falls, Oregon." *Id.* at 14,328.

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified.

The listing was also arbitrary and capricious because NMFS made no attempt to evaluate the extinction risk for the ESU as a whole, including the hatchery fish. Indeed, NMFS acknowledges that "[b]ecause of the heavy influence of spring-chinook salmon of hatchery origin in the Clackamas River, NMFS did not weigh Clackamas River abundance estimates heavily in their [*sic*] risk determinations for the Upper Willamette River ESU". *Id.* at 14,322. It was arbitrary and capricious for NMFS to exaggerate extinction risks by not giving full and equal weight to all members of the ESU.

Upper Willamette River Steelhead

In listing the Upper Willamette River steelhead, NMFS declared that "the North Santiam River (ODFW Stock 21) hatchery stock should be considered part of this ESU". 64 Fed. Reg. 14,517, 14,521 (Mar. 25, 1999). Other hatchery stocks were not included, though NMFS acknowledges that "[d]ue to introductions of non-native steelhead stocks and some transplantation of native stocks within the basin, it is difficult to formulate a clear picture of the present distribution of native Upper Willamette River steelhead, and their relationship to nonanadromous and possibly residualized *O. mykiss* within the basin". *Id.* NMFS further acknowledged that "[e]stimates of the proportion of hatchery fish in natural spawning escapements range from 5 to 25 percent". *Id.* at 14,524.

NMFS listed as "threatened":

"Upper Willamette River steelhead (*Oncorhynchus mykiss*). Includes all naturally-spawned populations of winter-run steelhead in the Willamette River, Oregon, and its tributaries upstream from Willamette Falls to the Calapooia River, inclusive . . .". *Id.* at 14,528.

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified. In addition, while NMFS did evaluate the North Santiam River hatchery stock as part of the ESU, it made no attempt to evaluate the extinction risk for the ESU as a whole, including the North Santiam fish. The listing is arbitrary and capricious for this reason.

Conclusion

The federal government has no lawful role in directing hatchery policy within the Pacific Northwest. That role is Constitutionally charged to the Region's states and Native American Tribes. Indeed, the federal government can and should withdraw entirely from attempting to control Columbia Basin salmon and steelhead management through the Endangered Species Act, restoring that role to the Region's states, acting through their

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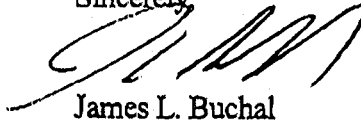
interstate compacts including the Northwest Power Planning Council. This delisting petition offers the vehicle for such a withdrawal.

The federal government has far more pressing business than micromanagement of salmon recovery in the Pacific Northwest, and its unlawful extensions of federal authority in these and other areas threaten to turn the federal government into a jack of all trades, but master of none. We ask that you serve our Nation's interests by faithfully executing the law and removing these "species" from the list, as part of a necessary effort to redirect federal resources upon issues of genuinely national concern.

This letter also constitutes notice, pursuant to 16 U.S.C. § 1540(g), of the District's intent to pursue any and all legal remedies available under the Act or otherwise to compel your faithful discharge of your duty to remove these "species" from the list. The District reserves the right to enter litigation to ensure appropriate and lawful actions on the part of NMFS.

Pursuant to 16 U.S.C. § 1533(b)(3)(A), you have ninety days to offer a substantive response to this petition for delisting.

Sincerely,



James L. Buchal

Copies by Certified Mail, Return Receipt Requested to:

Secretary of Commerce
Attorney General

Copies by Fax and First Class Mail to:

Governor Locke
Governor Kitzhaber
Governor Martz
Governor Kempthorne
Senator Murray
Senator Cantwell
Senator Smith
Senator Wyden
Senator Baucus
Senator Burns
Senator Craig
Senator Crapo
Congressman DeFazio
Congresswoman Hooley
Larry Cassidy, Chair, Northwest Power Planning Council